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No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COCA-COLA BOTTLING CO. OF LOUISVILLE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ORDERS AND OPINIONS BELOW

The order of the Court of Appeals (R. 541a) is reported at 219 F. 2d 441. No separate opinion accompanied this order. The findings of fact, conclusions of law and order of the Board (R. 392a–537a) are reported at 108 N. L. R. B. 490.

JURISDICTION

The order of the Court of Appeals (R. 541a) was entered on February 15, 1955. The petition for a writ of certiorari was filed May 13, 1955, and was granted October 10, 1955 (R. 542a). The jurisdiction of this Court rests on 28 U. S. C.

1254, and Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. at 147, 29 U. S. C. 160 (e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly held that the question of whether or not all of the officers of a labor organization have filed the non-Communist affidavits required by Section 9 (h) of the National Labor Relations Act may not be litigated in a Board unfair labor practice proceeding but is a matter for the Board to investigate and determine in separate administrative proceedings.

2. Whether the Board could properly hold that, in the absence of purposeful evasion as provided in its Rules and Regulations, the term "officer" within the meaning of Section 9 (h) is limited exclusively to a person occupying a position identified as an office in a union's constitution.

STATUTE AND RULE INVOLVED

Sections 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h), are set forth in the Appendix, *infra*, pp. 67–70. Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. 102.13, is set forth in the Appendix, *infra*, pp. 70–72.

STATEMENT

This case arises out of an unfair labor practice proceeding commenced before the National Labor Relations Board on a complaint brought by a union against respondent Coca-Cola Bottling Co. of Louisville, Inc. During the proceedings, respondent sought to litigate the question of whether there had been full union compliance with the non-Communist affidavit requirements of Section 9 (h) of the National Labor Relations Act, as amended (App., *infra*, pp. 69–70).

The Board, in finding that respondent had committed certain unfair labor practices, held, *inter alia*, that (a) the compliance status of the union under Section 9 (h) was a matter for determination by the Board in collateral administrative proceedings and not one which should be litigated directly in an unfair labor practice case; and (b) in any event respondent's offer of proof related to a union employee who did not come within the definition of a union "officer", within the meaning of Section 9 (h) of the Act (R. 527a-531a). When the Board petitioned the Court of Appeals for the Sixth Circuit to enforce its remedial order (R. 538a–539a), that court ordered the case remanded to the Board with directions to reopen the record in the unfair labor practice proceedings so as to permit respondent to adduce evidence as to the union's Section 9 (h) compliance status (R. 541a).

The detailed facts pertinent to the issues raised may be summarized as follows:

1. *Proceedings before the Board:* On May 17 and October 16, 1951, the United Brewery and Soft Drink Workers Local 20 (the Local), an affiliate of the Congress of Industrial Organizations (the CIO), filed unfair labor practice charges alleging that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act. The Board's General Counsel thereupon issued a complaint based on these charges (R. 5a–7a), it having been theretofore administratively determined that the Local and its affiliated unions, including the CIO, had complied with the non-Communist affidavit requirements of Section 9 (h) of the Act (R. 27a–29a, 516a–517a).

At the hearing on the complaint before a Board trial examiner, respondent sought to show that the CIO was not in compliance with Section 9 (h) of the Act, on the ground that one W. B. Taylor, CIO regional director for Kentucky and allegedly an officer of the CIO, had not filed a non-Communist affidavit. In support of its position respondent offered to adduce evidence purporting to show that Taylor exercised "administrative and executive duties and powers" over the Local and every union affiliated with the CIO in the State of Kentucky; and that Taylor "has been very active in his advice and in the prosecution" of the proceeding before the Board (R. 517a, 527a; 387a–389a). Respondent contended that Taylor's

duties and functions were such as to make him an officer of the CIO within the meaning of Section 9 (h). The trial examiner rejected the offer, holding, in conformity with the uniform decisions of the Board, that the question of compliance was a matter for administrative determination by the Board, and was not litigable by the parties in the unfair labor practice proceeding (R. 517a–518a). On the merits the trial examiner found that respondent had violated Sections 8 (a) (1) and 8 (a) (3) of the Act, as alleged in the complaint (R. 395a–515a, 521a).

2. *The Board's decision:* The Board upheld both the trial examiner's rulings on the procedural question and his findings on the merits (R. 526a–533a). Reaffirming its rule that "the compliance status of a union which is required to comply is a matter for administrative determination, and not one to be litigated in complaint or representation proceedings", the Board stated (R. 528a–529a):

> A recognition of the [n]eed to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption, and still is the reason for the retention, of this rule. Although adhering to such rule, the Board has nevertheless permitted, and even encouraged, parties to Board proceedings to bring to the Board's attention matters affecting the compliance status of unions. The Board thus has specifically provided in Section 102.13 (b) (3)

> of its Rules and Regulations, Series 6, as amended, for an investigation "where the Board has reasonable cause to believe" the filing requirements of Section 9 (h) of the Act are being purposely evaded, as is now contended by the Respondent. To assist the parties in calling such matters to its attention, the Board has adopted the policy of having its agents release to interested parties, under proper safeguards, names of designated union officers and of persons who have filed the required affidavits. Furthermore, the Board will entertain motions regarding the compliance status of unions, will consider such information as may be submitted in determining whether a situation warrants further investigation, and has in fact conducted such investigations. If the need therefor is shown, the Board will conduct a hearing in which the issue can be heard and determined. The occasion thus afforded the parties to institute collateral proceedings, and to have compliance matters heard and decided, is real and not illusory for the outcome of such a collateral proceeding may affect the substantive aspects of a pending case. [Footnotes omitted.]

The Board then pointed out that respondent had not availed itself of the Board's established procedure for determining compliance questions. It noted (R. 530a) that respondent, although apprised of Taylor's failure to file a non-Commu-

nist affidavit,[1] had not requested a collateral administrative proceeding but, instead, sought to raise the issue in the unfair labor practice case.

The Board further stated (R. 530a–531a) that, even if respondent, in accordance with the Board's practice, had properly raised the compliance question in a separate collateral proceeding, respondent's offer of proof would fall short of establishing that Taylor was an "officer" within the meaning of Section 9 (h) under the test previously adopted by the Board and incorporated in Section 102.13 (b) (3) of its Rules and Regulations (App., *infra*, pp. 71–72). Under this test, the Board treats as an "officer" a person occupying a position identified as an office in the union's constitution, or occupying a position which the union has omitted from the designation of officers in its constitution for the purpose of evading or circumventing the filing requirements of Section 9 (h) (App., *infra*, pp. 69–70). Applying this test, the Board found that Taylor was not an "officer", since it did not appear either that Taylor was occupying a position listed as an office in the CIO constitution or that the position which he occupied had been omitted from the

[1] Prior to the institution of the unfair labor practice hearing, and thereafter again in course of the hearing, respondent requested and obtained compliance information from the Board which, among other things, disclosed that Taylor had not filed a non-Communist affidavit (R. 528a, fn. 7; 25a–29a).

constitution in order to evade or circumvent the filing requirements of the Act (R. 531a).[2]

Accordingly, the Board concluded that the CIO was in compliance with the filing requirements of Section 9 (h), and entered an appropriate remedial order (R. 533a–537a).[3]

3. *Proceedings in the Court of Appeals:* Upon the Board's petition for enforcement of its remedial order, the Sixth Circuit, without passing upon the merits of the Board's unfair labor practice findings, ordered the case remanded to the Board for further proceedings (R. 541a). The

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[2] The CIO's constitution (Article IV, Section 1) lists the following officers: president, executive vice president, secretary-treasurer and eight vice presidents, all elected by a majority vote at its annual convention. Neither the current constitution nor the constitutions prior to the enactment of the Taft-Hartley Act listed the position of regional director as an office. The regional directors are under the supervision of the CIO's organizational department which in turn is directed by the executive vice president (Article V, Section 5, of the CIO's constitution); Hardman & Neufeld, *The House of Labor* (Prentice-Hall, Inc., 1951), p. 11; Report to the CIO by President Walter P. Reuther, 15th Constitutional Convention (1953), p. 28.

[3] Two of the four Board members (Chairman Farmer and Member Rodgers), who participated in the decision in the instant case, joined in the conclusion that the CIO was in compliance with the Act under the Board's "constitutional test," but reserved decision on whether such test is "the exclusive basis for determining compliance" (R. 531a, fn. 15). Subsequently Chairman Farmer and Member Rodgers followed and applied the "constitutional test" in other cases without expressing any reservation. See *General Shoe Corp.*, 109 N. L. R. B. 618, and *Crown Upholstering Co.*, 110 N. L. R. B. 22.

court noted in its order that concededly Taylor had not filed a Section 9 (h) affidavit; that respondent had offered to prove that Taylor is "an officer of the CIO" exercising "administrative and executive powers over" the Local and a "working control over every CIO local union and affiliated national union which operates within the Commonwealth of Kentucky and the CIO region"; and that the trial examiner, with the subsequent approval of the Board, had excluded this evidence and would not permit the question of noncompliance to be raised in the unfair labor practice proceeding. Relying on this Court's decision in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, the court stated that "respondent is entitled to a judicial review of the legal question whether there has been compliance with Section 9 (h)" of the Act. Accordingly, it remanded the case to the Board "with instructions to permit respondent to introduce testimony as to the functions and extent of jurisdiction of said W. B. Taylor as Regional Director of the CIO and with instructions to make relevant findings of fact and conclusions of law and to certify the same to [the] court" (R. 541a).

SUMMARY OF ARGUMENT

I

The ascertainment of a union's compliance status under Section 9 (h) of the National Labor

Relations Act (App., *infra*, pp. 69–70) has been committed by Congress to the Board's administrative determination without requiring litigation of the question in unfair labor practice or representation proceedings. The reason underlying the statutory scheme in this respect is the need to expedite the hearing of cases and the resolution of issues on their merits. The legislative history of Section 9 (h) discloses that in enacting that section in its present form Congress sought especially to safeguard against the "indefinite" or "endless delays," in the resolution of the merits of unfair labor practice or representation proceedings, which administration of that section in such proceedings might entail.

To permit litigation of a union's compliance status under Section 9 (h) in the course of hearings in unfair labor practice or representation proceedings would open a host of issues totally unrelated to whether an unfair labor practice had been committed or to the determination of the employees' choice of a bargaining representative. In either case it would permit numerous opportunities for delay in the final adjudication of such matters on the merits. The determination of a union's compliance status is a continuing process requiring the resolution of many questions of fact. If each of the subsidiary questions upon which a compliance determination rests could be called into question in hearings on

the merits, the resolution of the latter would be submerged in a welter of side issues. To construe the Act as requiring litigation of such issues in hearings on the merits would seriously impede and delay the real function of the Board in deciding unfair labor practice cases and determining bargaining representatives and tend to make the statute administratively unworkable.

The view that the Board need not permit litigation of compliance status in hearings on the merits is confirmed by the scheme of the parallel provisions of Sections 9 (f) and (g) (App., *infra*, pp. 67–69). Compliance with those sections was definitely not intended by Congress to be litigable. There is no discernible basis for concluding that Congress intended to draw a distinction between litigability of compliance under Sections 9 (f) and (g) on the one hand and Section 9 (h) on the other.

The collateral administrative procedure adopted by the Board for the determination of a union's compliance status effectuates the Congressional purpose. It operates to keep both the compliance proceeding and the proceeding on the merits within bounds and avoids a diffusion of the issue in different types of proceedings dealing with entirely unrelated matters. It permits the Board to dispose of the compliance question on a union-by-union basis instead of an unworkable case-by-case basis.

II

The Board's construction of the term "officer" in Section 9 (h) to mean a person occupying a position identified as an office in a union's constitution or bylaws is reasonable and proper. Since the Act does not define the term, Congress must be presumed to have used the word in its normal and ordinary sense. The Board's definition of the term accords with the normal understanding of the term commonly accepted in the field of labor relations as well as in corporate law.

Moreover, in Section 9 (f), Congress required operational and financial information concerning "officers or agents" and "officers or stewards". If Congress had meant to require non-Communist affidavits from union agents other than "officers" in the commonly understood sense of the latter term, it had a simple way to express that intention as it did in Section 9 (f). The use of the different terminology in the two related sections, simultaneously enacted, furnishes a strong presumption that Congress in Section 9 (h) purposefully drew a distinction between "officers" and "agents" and used the term "officer" to cover persons occupying positions listed in the union's organic instruments. Legislative proposals dealing with Section 9 (h) since its amendment, and the accompanying legislative history, confirm the propriety of the Board's reading of the Section.

The Board's definition accords with the Congressional purpose in enacting Section 9 (h) and is reasonably calculated to effectuate that purpose. Weighing the evil which it sought to remedy against the practical administration of Section 9 (h), Congress apparently concluded that eradication of Communist influence from the most prominent positions of labor organizations would extirpate the main possibilities of Communist control. Congress could have extended the coverage of Section 9 (h) to include all "influential" union agents. The difficulties inherent in the administration of a "leadership" or "influential" test may well have prompted Congress to draw the line at "officers." In these circumstances the Board's interpretation is entitled to peculiar weight for it represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 315).

ARGUMENT

INTRODUCTION

In *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, this Court considered the question whether a parent labor federation, such as the CIO, was a national or international labor organization within the

meaning of Section 9 (h) of the Act (App., *infra*, pp. 69–70) and therefore subject to the filing requirements of that section. In concluding that the CIO fell within the statutory definition, the Court held that the question whether a labor organization was required to comply with Section 9 (h) was litigable and judicially reviewable in an unfair labor practice proceeding where, as in that case, the determination of that question turned upon "admitted facts" and presented only an issue of law.

One of the issues presented in this case is whether a party to an unfair labor practice case may litigate in that proceeding the question whether a labor organization, such as the CIO whose officers under the *Highland Park* decision are *required* to file non-Communist affidavits, has *in fact* met the filing requirements. Contrary to the ruling below, the Board is of the view, as more fully set forth below under Point I (*infra*, pp. 15–48), that ascertainment of a union's compliance status under Section 9 (h) has been committed by Congress to the Board's administrative determination without requiring litigation of the question in each unfair labor practice or representation proceeding where raised as an issue.

The further issue is also here posed, whether the Board's "constitutional test" for determining who are "officers" of labor organizations for purposes of Section 9 (h) is proper and valid. Re-

jecting this test, the court below held that the determinative factor is not the listing of the position in question in the union's constitution but rather "the functions and extent of jurisdiction" lodged in the individual in question (R. 541a). As we explain below under Point II (*infra*, pp. 48–66), the test adopted by the court below, with its lack of objective standards, would go far to render Section 9 (h) administratively unworkable. The test adopted by the Board avoids this serious obstacle and squarely comports with the Congressional purpose.

I

THE ASCERTAINMENT OF A UNION'S COMPLIANCE STATUS HAS BEEN COMMITTED BY CONGRESS TO THE BOARD'S ADMINISTRATIVE DETERMINATION WITHOUT REQUIRING LITIGATION OF THE QUESTION IN UNFAIR LABOR PRACTICE OR REPRESENTATION PROCEEDINGS

A. THE PROCEDURAL PROVISIONS OF SECTIONS 9 (f), (g), AND (h) AND THE BOARD'S METHOD OF DETERMINING COMPLIANCE WITH THESE SECTIONS

Sections 9 (f), (g), and (h) (App., *infra*, pp. 67–70) were incorporated into the Act by the 1947 Taft-Hartley amendments which became effective on August 22, 1947. Under these sections a labor organization desiring to utilize the facilities of the Board must, as a condition precedent, file certain financial and operational statements with the Secretary of Labor, furnish its members with

annual financial reports, and file with the Board non-Communist affidavits for each of its officers. Unless these filing and reporting requirements are complied with, the Board may not investigate a question concerning representation raised by, nor issue a complaint based upon unfair labor practice charges filed by, a noncomplying union. *National Labor Relations Board* v. *Dant*, 344 U. S. 375.

The statute does not establish any procedure, formal or informal, to be followed by the Secretary of Labor or the Board in determining whether affidavits and information filed by labor organizations pursuant to Sections 9 (f), (g), and (h) satisfy the filing requirements. "There is nothing in the Act requiring the Board to hold a judicial hearing on the question of compliance. Rather, the effect of the Act is to make its provisions effective and available to a union upon the occurrence of a certain event and it becomes the duty of the Board to determine whether that event has occurred." *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6).

To meet the obligation imposed upon it by the statute, the Board established elaborate administrative machinery for the purpose of enabling it to determine whether the moving labor organization has properly complied with the requirements of Sections 9 (f) (g), and (h). See Rules

and Regulations of the National Labor Relations Board, Series 6, 29 C. F. R. Section 102.13 (App., *infra*, pp. 70–72); *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844 (C. A. 4). An Affidavit Compliance Branch was established within the Board in order to keep records, send notifications of lapses in compliance, and carry on the other activities incidental to the proper exercise of the Board's statutory duties.[4]

When the material required by Sections 9 (f), (g) and (h) is initially filed with the regional director, a careful examination of the forms and their contents is made by the regional office. An investigation may be made if the regional director

[4] In addition to the Affidavit Compliance Branch, each regional office keeps records of the compliance status of local unions within its area.

[5] The Compliance Branch has printed and distributed to unions a booklet called *A Guide for Labor Organizations*, which describes the procedures and forms established by the Board and the Department of Labor for complying with the filing requirements. These forms, which are available at the Board's regional offices, include the non-Communist affidavit (Form NLRB–1081), a certificate of distribution of financial data (Form NLRB–1085), a certificate of union officers (Form NLRB–1080), and a certificate of intent to remain in compliance (Form NLRB–3054). The Department of Labor also publishes a form for furnishing the required financial information (Form No. 44–R700). When this latter form is accepted by the Secretary of Labor, a letter certifying that fact is sent to the union, which in turn sends a copy to the Affidavit Compliance Branch of the Board.

is not satisfied with the certificate of distribution of financial data. In the case of non-Communist affidavits, a cross-check is made against the certificate of union officers, which is in turn checked against the union constitution and bylaws. Where investigation discloses that an office was fraudulently omitted from the constitution for the purpose of evading the filing requirements the Board may require affidavits from those who hold such positions (App., *infra*, p. 72). Incorrectly prepared reports or affidavits are rejected and follow-ups on them are required. When all the documents are finally ready for filing, they are sent to the Affidavit Compliance Branch in Washington, D. C., and the regional office retains the information on separate records. Thus at any given time it is possible for the Board and legitimately interested persons to learn the compliance status of any union.

When a case is initiated before the Board by a petitioning or charging union, compliance is checked not once, but continually throughout the pendency of the matter. In an unfair labor practice case, checks must be made during the investigation prior to the issuance of a complaint, which is the critical date, and before an order to bargain is entered in the case of a violation of Section 8 (a) (5). In representation cases, since no certification will issue in favor of a union not in compliance at the time of certification, periodic checks as to the union's compliance are

made after the filing of the petition, including a check at the time the Board orders an election, and another before certification of the results of the election. Continued policing of compliance is necessitated because lapses in compliance frequently result from vacancies in union offices, changes in organizational structure and other circumstances. *National Labor Relations Board v. Dant*, 344 U. S. 375, 383.

Thus, the policing of compliance is not concentrated upon any one particular period in point of time. It is an all-year-round subject of inquiry, in which the branch of the agency vested with the policing function deals with day-to-day fluctuations in the status of many thousands of unions which have filed the numerous prescribed documents with it.

B. CONGRESS DID NOT INTEND TO REQUIRE THE BOARD TO PERMIT LITIGATION OF THE COMPLIANCE STATUS OF A LABOR ORGANIZATION, UNDER SECTION 9 (h), IN A REPRESENTATION OR COMPLAINT PROCEEDING.

In one of the earliest cases (a representation proceeding) dealing with the compliance question, the Board stated: "In view of the language of those sections * * * precluding *the Board* from investigating any question concerning the representation of employees where the requirements have not been met, the matter of compliance is clearly one for the Board to determine in any manner suited to the circumstances." *Lion Oil Company*, 76 N. L. R. B. 565, 566.

(1948). The Board has uniformly taken the position that the question whether a particular union is in fact in compliance with the filing requirements of Sections 9 (f), (g), and (h) is a question to be determined administratively by the agency and may not be litigated in a representation or unfair labor practice proceeding.[6] The underlying reason for this position was explained by the Board in the instant case when it stated (R. 528a): "A recognition of the need to expedite the hearing of cases and the resolution of issues on their merits was the reason for the adoption and still is the reason for the retention of this rule."

The legislative history of Section 9 (h) establishes that Congress in enacting that provision sought especially to safeguard against and avoid "indefinite" or "endless delays" which administration of that section might entail in the resolution of the merits of unfair labor practice or representation proceedings. Indeed, the same considerations which the Board has emphasized, namely, "the need to expedite the hearing of cases and the resolution of issues on their merits" without becoming bogged down in compliance matters, also prompted the Congress which en-

[6] See National Labor Relations Board, *Thirteenth Annual Report* (1948), pp. 14–16; National Labor Relations Board, *Fifteenth Annual Report* (1950), pp. 19–20; *The Baldwin Locomotive Works*, 76 N. L. R. B. 922, 923; *Comfort Spring Corp.*, 90 N. L. R. B. 173; *Luckenbach Steamship Co., Inc.*, 103 N. L. R. B. 1.

acted Section 9 (h) to eliminate from earlier versions of this section features which had been criticized as creating endless delays in Board proceedings on the merits. As originally passed by the House and the Senate,[7] Section 9 (h) provided in substance that no labor organization should be eligible for certification as a collective bargaining representative if its officers were members of the Communist Party or held other proscribed membership, affiliation or belief. This proposed amendment, which would have required the Board to ascertain as a matter of fact whether the union officers were Communists, was changed in conference to its present form, so as not to compel the Board to make that determination. Explaining this change to the Senate, Senator Taft said (93 Cong. Rec. 6444; Leg. Hist., p. 1542):

> Subsection 9 (h) of the conference agreement embodies the principle of an amendment adopted when the bill was being considered on the floor of the Senate which would have prevented a labor organization from being eligible for certification if any of its local, national, or international officers were members or affiliates of the Communist Party or believed in or supported

[7] H. R. 3020, 80th Cong., 1st Sess., Sec. 9 (f) (6); Legislative History of the Labor Management Relations Act, 1947 (Govt. Print. Off. 1948), hereafter referred to "Leg. Hist.", p. 196.

[8] H. R. 3020, 80th Cong., 1st Sess., Sec. 9 (h); Leg. Hist. 251.

organizations advocating the overthrow of the United States Government by force or any other illegal or unconstitutional method. There was a similar provision in the House bill, although the language was somewhat different. *In reconciling the two provisions the conferees took into account the fact that representation proceedings might be indefinitely delayed if the Board was required to investigate the character of all the local and national officers as well as the character of the officers of the parent body or federation.* The conference agreement provides that no certification shall be made or any complaint issued unless the labor organization in question submits affidavits executed by each of its officers and officers of its national or international body, to the effect that they are not members or affiliates of the Communist Party or any other proscribed organization. [Emphasis added.]

In response to a query on the floor of the Senate, Senator Taft said (93 Cong. Rec. 6447; Leg. Hist., p. 1547):

* * * The Senate adopted an amendment which provided that no union could be certified if any of its officers were Communists. That seemed to us impracticable. With the agreement of all the conferees we provided that the union must file an affidavit that none of its officers are Communists, or whatever the language may be. *Otherwise, the way it was passed by the*

> *Senate, the whole certification might be tied up for months while determination was made as to whether a man was a Communist.* Today it is provided that officers shall file statements to the effect that they are not Communists. [Emphasis added.]

In a Supplementary Analysis of the Act submitted to the Senate on June 12, 1947 (93 Cong. Rec. 6860, Leg. Hist., p. 1625), Senator Taft further explained:

> Section 9 (h). This provision making the filing of affidavits with respect to Communist Party affiliation by its officers a condition precedent to use of the processes of the Board has been criticized as creating endless delays. It was to prevent such delays that this provision was amended by the conferees. Under both the Senate and House bills the Board's certification proceedings could have been indefinitely delayed while it investigated and determined Communist Party affiliation.

The Board's position that compliance under Section 9 (h) is to be determined administratively by the agency and may not be litigated by the parties in the course of hearings on representation or unfair labor practice questions has been approved by the Joint Committee on Labor-Management Relations, created by Section 401 of the Taft-Hartley Act, 61 Stat. 136, 160, to study and investigate "the administration and operation of existing Federal laws relating to labor relations" (Sec. 402). Reporting to Con-

gress in 1948, the Committee, after recommending that Section 9 (h) be amended in certain respects, declared as follows (S. Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 45):

> The committee wishes to emphasize as strongly as possible that in any consideration of amendments to this section, great care must be given to prevent litigation of the question in Board hearings. If the parties to Board hearings are permitted to question the veracity of the affidavit, or the fact as to it having been filed, records will be hopelessly overburdened with such proof. Board hearings must be confined to evidence going into merits of the case at hand if the Board is to carry out its real function of deciding unfair labor practice cases and determining bargaining representatives. The Board recognized this principle in *Lion Oil Co.* (15–R–2264) when it upheld the ruling of the hearing officer in his denial of the employer's motion to dismiss the petition since the record did not show the petitioning union had complied with the requirements of Section 9 (f) and (h). The Board said that compliance is clearly for the Board to determine and its official records indicated that the union had complied.

In view of the character of that Committee and the purposes for which it was set up, and the continuing scrutiny which Congress has accorded to the amended Act, the Committee's endorsement

of the Board's position is "persuasive evidence of the adoption by Congress of the construction given the filing requirements here in question by the Board, in the *Lion Oil Co.* case". *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 923 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.*, v. *National Labor Relations Board*, 342 U. S. 859.

The foregoing legislative history reflects, we think, a broad Congressional purpose to commit the ascertainment of compliance status under Section 9 (h) to the Board's administrative determination without requiring litigation of the question in unfair labor practice or representation proceedings. Congress thus sought to insure that the determination of a union's compliance status would not unduly prolong or defer the resolution of the merits of representation and unfair labor practice proceedings.

To effectuate the policy of Congress as evidenced by this legislative history, the courts have consistently held that in unfair labor practice cases the Board is not required either to allege or to prove that the charging union has in fact complied with Sections 9 (f), (g), and (h) when the complaint was issued. The Board has therefore not been required to include as part of the record in an unfair labor practice proceeding its determination that the charging union had complied, or to open to attack the bases upon which

its determination rested. Thus, in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4), the court, in rejecting the view urged by the employer that in an unfair labor practice proceeding the Board's General Counsel must allege and prove that the union was in compliance, stated:

> There is nothing in the language of the statute expressly requiring this; and if such view were to be taken, it would greatly hamper the administration of the act, since it would be incumbent upon the general counsel to show compliance, not only with the requirements as to filing affidavits but also with those requiring the giving of notice to members * * *. Surely nothing of the sort was contemplated in the passage of the statute; and it is well settled that the courts will not construe a statute in such way as to make it administratively unworkable if any other construction is possible.

Accord: *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 77–78 (C. A. 5); *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917 (C. A. 6), certiorari denied *sub nom. Ann Arbor Press, Inc.* v. *National Labor Relations Board*, 342 U. S. 859; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650 (C. A. 6); *Law* v. *National Labor Relations Board*, 192 F. 2d 236, 239 (C. A. 10); *Victor Products Corp.* v. *National Labor Relations Board*, 208 F. 2d 834 (C. A. D. C.).

Similarly the courts have held that the "truthfulness" of the non-Communist affidavits filed by the labor organization is not litigable in unfair labor practice proceedings. "With respect to the verity of the non-Communist affidavits * * * the type of problem involved and the history of the statute do not indicate any intention on the part of Congress to permit the respondent in an unfair labor practice proceeding to raise and litigate in that proceeding the question of compliance on the part of the charging union." *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371–372 (C. A. 5), certiorari denied, 348 U. S. 873; cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968; *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943.

The Congressional purpose not to require litigation of compliance status under Section 9 (h) in representation or complaint proceedings is shown in yet another way. As to the requirement of Sections 9 (f) and (g) that unions submit financial reports, it is manifest that Congress did not contemplate litigation, since the financial reports which unions were to file under those sections were "not [to be] made open to the public". (See Senator Taft's and Senator Smith's explanations at 93 Cong. Rec. 3839, 4284, Leg. Hist.

1014, 1150.) In executing its functions under Sections 9 (f) and (g) in accordance with this Congressional object, the Department of Labor in 1949 issued a General Regulation (General Regulations of the Office of the Secretary of Labor, 29 C. F. R. (1955 Supp.) 2.4) stating that none of its officers or employees "shall make such information public, nor disclose such information to any person outside of the Department of Labor except upon written request", to interested and affected union members, the Board, the courts and certain Congressional committees.

To permit litigation concerning union compliance with Sections 9 (f) and (g) in representation or complaint proceedings would be completely incompatible with this Congressional objective of not making the reports public, because the reports themselves would have to be introduced in evidence and would thereby be made available to the public. Without access to the reports employers lack the necessary information upon which any attack upon the accuracy or completeness of the union's compliance with the statutory requirements could be based.

Beyond this, Congress' division of responsibility for administering Sections 9 (f) and (g) between the Secretary of Labor and the Board makes it apparent that Congress did not contemplate or intend that a union's compliance with the section would be litigable. The documents

and information contemplated by Sections 9 (f) and (g) must be filed with the Secretary of Labor. The Secretary of Labor, not the Board, was entrusted with initial responsibility for determining the form and content of the information to be filed, and the adequacy, accuracy and completeness of information. The Board has assumed, in the absence of clear evidence to the contrary, that Congress could not have intended that the Board should act as a reviewing or revisory agency over determinations of the Secretary of Labor. To hold that the union's compliance with Sections 9 (f) and (g) is litigable in representation or unfair labor practice proceedings would place in issue the administrative determinations of the Secretary of Labor. Indeed, the Secretary would be required to defend his determinations both before the Board and in the courts. Such a purpose cannot reasonably be attributed to Congress.

Sections 9 (f), (g), and (h) are parallel provisions; there is no discernible basis for concluding that Congress had a purpose that one should raise litigable issues respecting compliance status and that the others should not. *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371–372, n. 3 (C. A. 5), certiorari denied, 348 U. S. 873. Cf. *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 383, where this Court stated: "It would seem that the construction of § 9 (h) * * * would lead to a like construction of § 9 (f) and (g)."

C. TO REQUIRE THE BOARD TO PERMIT LITIGATION OF THE QUESTION OF A UNION'S COMPLIANCE STATUS IN REPRESENTATION OR COMPLAINT PROCEEDINGS WOULD CREATE INNUMERABLE OPPORTUNITIES FOR DELAY AND WOULD THUS SUBSTANTIALLY IMPAIR THE BOARD'S ABILITY TO PERFORM ITS PRINCIPAL STATUTORY FUNCTIONS UNDER THE ACT

The issue in an unfair labor practice proceeding, as here, is, of course, whether "any person named in the complaint has engaged in or is engaging in any such unfair labor practice". Section 10 (c) of the Act. "When a Board complaint issues, the question is only the truth of its accusations." *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18. In a representation proceeding, there is involved the determination of the employees' choice of bargaining representative. Section 9 (a), (b), and (c).

To permit litigation in each unfair labor practice or representation proceeding where the fact of compliance by a union was raised as an issue, as distinguished from the necessity of compliance, would open a host of issues unrelated to the unfair labor practices dealt with in the complaint or the determination of the employees' choice of bargaining representation and in either case would permit numerous opportunities for delay in the final adjudication of those matters. As shown, *supra*, pp. 16–19, the determination of compliance is not a simple matter. It requires resolution of many questions of fact. If each of the subsidiary questions upon which a compliance determination

rests could be called into question in an unfair labor practice or representation proceeding, the merits would be submerged in a welter of side issues.

Moreover, the issue would be subject to litigation in every unfair labor practice or representation proceeding wherever it was raised. The Board's determination in any particular case that the officers of a union had complied with the filing requirements would not foreclose parties in other unfair labor practice or representation proceedings, either pending or arising in the future, from reopening the issue in those proceedings since the Board's resolution of the issue in one case would not be binding on other parties in other cases.

The inquiry posed in this case—whether a labor organization is not in compliance because one of its alleged officers failed to file a non-Communist affidavit—illustrates the serious difficulties which the ruling below creates in the administration of the Act. At the hearing respondent offered to show that one W. P. Taylor, CIO Regional Director for Kentucky, was, by reason of his position with the CIO, an "officer" of that union. Respondent contended that because of Taylor's failure to file the CIO was not in compliance with Section 9 (h). In support of its position, respondent offered to show that Taylor exercises "administrative and executive duties and powers over" the charging local, an affiliate of the CIO, and every other CIO local union and affiliated

international union in Kentucky; and that Taylor "has been very active in his advice and in the prosecution of this cause" (R. 517a, 527a, 387a-389a).

It is evident that to substantiate its position respondent would have had to introduce evidence as to the organizational structure of the CIO and its affiliated international and local unions in the State of Kentucky. Respondent would have had to establish Taylor's role in the operation of these unions,[9] his connections with them, the extent of his direction of, and participation in, the affairs of such unions, including their collective bargaining negotiations, their meetings, organizational drives, and so far as the instant case is concerned, Taylor's role in the prosecution of the instant unfair labor practice proceeding. In this connection, respondent might have required, in addition to the testimony of union officials and others, the production of the minutes of meetings, bylaws and constitutions of all of the unions with which Taylor was in any way connected.

The far-reaching scope of the inquiry underscores the reality of the danger, which the Joint Committee anticipated, of having records in either unfair labor practice or representation hearings "hopelessly overburdened with such proof" (*supra*, p. 24). It would be strange

[9] We are informed that the CIO is affiliated with seventeen international unions and eighty-eight local unions in the State of Kentucky.

indeed to find that Congress closed the door to the vexing delay which would arise from permitting inquiry by an employer either in an unfair labor practice or representation proceeding into the veracity of a non-Communist affidavit only to leave the door open to similar delay by requiring the Board to permit inquiry by an employee in each proceeding whenever the union's compliance status was challenged. In its report (*supra*, p. 24), the Joint Committee pointed out the identity of the considerations involved, for it appropriately observed that it was important "to prevent litigation" not only of the "veracity of the affidavit", but also as to "its having been filed" by the labor organization. The introduction of evidence on each of these issues would obviously operate to delay and impede the Board's "real function of deciding unfair labor practice cases and determining bargaining representatives" (*ibid.*).

What we have pointed out above has particular application in this case if, as the court below apparently held (*infra*, pp. 49–50), the test for determining the persons subject to the filing requirements is a "functional test", i. e., one depending on "the functions and extent of jurisdiction" of the individual in question. The magnitude and scope of the inquiry which such a test, so lacking in objective standards would involve, scarcely requires elaboration. The impact which it would have on the Board's real function

of deciding cases on their merits is readily apparent. But even under the Board's "constitutional test", which treats as an "officer" every person occupying a position identified in the union's constitution as an office, or occupying a position which the union has omitted from the designation of officers in its constitution for the purpose of evading or circumventing the filing requirements of Section 9 (h), it is clear that to permit litigation of compliance status would likewise lead to serious delay in the resolution of the substantive issues in unfair labor practice and representation proceedings.

Litigation in an unfair labor practice or representation proceeding as to whether a person is an "officer" under the "constitutional test" would, first of all, require the introduction of evidence as to the status of the individual under the union's constitution. Where, as sometimes is the case, the provision in the constitution regarding officers is ambiguous, the ambiguity would have to be resolved by extrinsic evidence. Cf. *Compliance Status of Local 1150, United Electrical, Radio and Machine Workers of America*, 96 N. L. R. B. 1029; *Compliance Status of Furniture Workers, etc., Local 576*, 107 N. L. R. B. 872. Furthermore, if the position, alleged to be an office, is omitted from the constitution, the union's motive in making the omission would become the central issue.

In determining the question of motive the most

obvious motive for the individual's failure to file an affidavit would be his inability to attest to non-membership in the Communist party or freedom from other disqualifications. Thus, as to a person alleged to be a union officer, it would be relevant for an employer, in any hearing on the merits of a representation or unfair labor practice case, to prove, and for a union to disprove, the Communist party membership of the individual in question. It was precisely this type of inquiry which Congress feared would make for endless delays in the resolution of such cases.

As we have shown (*supra*, pp. 20–23), these considerations prompted the enactment of Section 9 (h) in its present form so as to relieve the Board from having to permit litigation of issues of this kind in hearings on the merits. Moreover, if evidence could be adduced as to one individual, the same issue could be raised as to virtually every person performing any duties for the charging union, its international and every other affiliated union (see *infra*, p. 61). Accordingly, the litigation of the identity of union officers, even under the Board's test, would introduce into Board hearings the very mischief which Congress sought to avoid, namely, the investigation, in hearings on the merits, of "the character of all the local and national officers as well as the character of the officers of the parent body or federation" (*supra*, p. 22). Thus it becomes manifest, as the Fifth

Circuit has held in *National Labor Relations Board v. Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873,[1] a case similar to the instant one, that

> * * * Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act. We find no authority in the statute supporting the view that * * * completeness of the affidavits may be challenged in a defense to proceedings conducted by the Board * * *.

The litigability of the officer issue under Section 9 (h), however, is but one aspect of a broader problem. Since Sections 9 (f) and (h) are parallel provisions (*supra*, p. 29), if compliance with Section 9 (h) were held litigable, by the same token compliance with Section 9 (f) could likewise be required to be litigated in hearings on the merits. Litigation of compliance with Section 9 (f) could give rise to an even greater range of issues than those arising under Section 9 (h).

[1] Accord: *American Rubber Products Corp. v. National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7). But cf. *Goodman Manufacturing Co. v. National Labor Relations Board*, decided November 10, 1955, where the Seventh Circuit has expressed agreement with the decision below.

To comply with Section 9 (f) a labor organization must file with the Secretary of Labor detailed information including a copy of its constitution and bylaws, and a report showing the name of the union, the address of its principal place of business, the names of its three principal officers, the titles of the offices they hold, the amounts they receive as compensation and allowances, the names of other officers and agents whose compensation and allowances exceed $5,000; the titles of such officers, the manner of selecting all the above officers and agents, the initiation fee for new members, and the regular dues for members. Labor organizations must also report, either separately or by reference to appropriate provisions in their constitution and bylaws, the following: any qualifications and restrictions as to membership; the procedures for election of officers and stewards, calling regular and special meetings, levying assessments and fines, authorization of bargaining demands, ratification of contract terms, authorization for strikes, authorization for spending funds, and audit of union financial transactions; union participation in insurance or benefit plans; and grounds and procedures for expulsion of members. In addition, a labor organization must make a financial report, and supply a copy thereof, to each of its members, showing its total receipts for the past fiscal year, the sources of these receipts, its total assets and liabilities as of the end of the past fiscal year,

disbursements made during the fiscal year and the purpose of such disbursements. Section 9 (g) requires labor organizations annually to file reports with the Secretary of Labor bringing the information previously supplied up to date, and to furnish the financial data to their members.

If litigation as to compliance were permitted in unfair labor practice or representation hearings, employers in such cases could raise an issue with respect to each of the separate items thus required, contending that the union had not filed with the Secretary one or more of the specified pieces of information. Beyond that, since the statute obviously contemplates that true and accurate information shall be filed, employers could contend, and introduce evidence to prove, that any one or more of the items of information supplied was, in one or more particulars, incorrect. For example, employers presumably could contend that the union's statement of assets was grossly inaccurate because excess depreciation was taken, or because reserves set up to meet contingent liabilities were excessive. The broad field of accounting practice, and with it the opportunity of adducing time-consuming expert testimony, would likewise appear to be opened up to employers.

To construe the Act as requiring litigation of such issues in a complaint proceeding would, as the Fourth Circuit pointed out in *National Labor Relations Board* v. *Greensboro Coca Cola Bottling*

Co., 180 F. 2d 840, 845, make the statute "administratively unworkable". The rule that the construction of a statute which would render it unworkable should be avoided if any other construction is reasonably possible has special application here where, as we have shown, Congress itself expressed concern lest the provisions of Sections 9 (f) and (h) be held to operate in such fashion as to impede and delay the "real function of [the Board in] deciding unfair labor practice cases and determining bargaining representatives" (*supra*, pp. 20–23, 24).

D. THE METHOD ADOPTED BY THE BOARD FOR DETERMINING COMPLIANCE STATUS IN A SEPARATE ADMINISTRATIVE PROCEEDING FULLY EFFECTUATES THE PURPOSES OF THE ACT WITHOUT UNNECESSARILY INTERFERING WITH THE DISPOSITION OF REPRESENTATION OR COMPLAINT PROCEEDINGS ON THE MERITS

In order to achieve the objective of Congress to insure compliance by labor organizations with the statutory filing provisions without at the same time unduly hampering the disposition of representation or complaint proceedings on the merits, the Board, as we have seen (*supra*, pp. 5–6), has provided a separate collateral proceeding for the determination of questions relating to a union's compliance status. As noted, before proceeding to investigate questions concerning representation or issuing complaints the Board carefully checks the compliance status of the moving labor organization (*supra*, pp. 16–19). As a practical matter compliance by the labor organization has to be redetermined frequently throughout the Board's

proceedings in view of possible lapses from compliance occasioned by vacancies in union offices and many other circumstances. *National Labor Relations Board v. Dant*, 344 U. S. 375, 383.

To assist it in its investigations, the Board encourages parties to a proceeding to bring to its attention all matters affecting the union's compliance status and provides the parties with pertinent compliance information for this purpose.[11] Furthermore, the Board will entertain motions regarding the compliance status of unions and will consider such information as may be submitted to it in determining whether a situation warrants further investigation.[12] To insure that all of the "officers" of a union have filed the required affidavits the Board requires a union to submit a "certificate of union officers", signed by an "authorized agent", containing the titles of all union offices listed in the constitution and bylaws of the union, the names of the persons occupying those offices, and the dates of the expiration of the terms of office, together with a

[11] See R. 528a; *Sunbeam Corp.*, 94 N. L. R. B. 844; *Aerovox Corp.*, 104 N. L. R. B. 246, enforced, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968. Thus in the present case the Board, upon respondent's request, furnished respondent the names of the officers of the CIO as well as of the charging local, together with a statement that Taylor, the CIO regional director for Kentucky, was not listed as an officer and had not filed a non-Communist affidavit (R. 528a; 274–29a).

[12] *Ibid.* See also *Metropolitan Life Insurance Co.*, 90 N. L. R. B. 935; *Compliance Status of Local No. 1150, U. E. W.*, 96 N. L. R. B. 1029.

copy of the constitution and bylaws against which the list of offices may be checked.[13] The person filing the "certificate of union offices" is liable for criminal prosecution for any willfully false statement made in it,[14] so that the incentive to be accurate and truthful in preparing this affidavit is identical with that which prevails in filing the non-Communist affidavits by the union officers themselves (see App., *infra*, pp. 70–71).

As a further safeguard against evasion, the Board provides that where it "has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing" the filing requirements of Section 9 (h) of the Act, the Board may require affidavits from persons other than those named as officers by the union (*infra*, pp. 48–49). In order to determine possible evasion the Board will conduct an investigation and, upon a proper showing, a hearing in which the issue can be heard and determined.[15]

[13] See *supra*, p. 18; Board's Rules and Regulations, 29 C. F. R. (1955 Supp.) 102.13 (App. *infra*, pp. 70–72).

[14] See 18 U. S. C. 1001; *Craddock-Terry Shoe Corp.*, 76 N. L. R. B. 842, 843; *Marzani* v. *United States*, 168 F. 2d 133, 141–142 (C. A. D. C.); affirmed, 335 U. S. 895.

[15] See R. 528a–529a. See also, Board's *Seventeenth Annual Report* (1952), p. 26; Board's *Nineteenth Annual Report* (1954), pp. 10–11. *Compliance Status of Plaster Tenders, Construction, General and Shipyard Laborers, Local Union No. 802, etc.*, 111 N. L. R. B. 742; *General Shoe Corp.*, 109 N. L. R. B. 618.

The advantage of the separate administrative investigation and hearing procedure is that it operates to keep both the compliance proceeding and the proceeding on the merits within bounds, and avoids a diffusion of the issues in different types of proceedings dealing with entirely unrelated matters. *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6). It also permits the Board to dispose of the compliance question on a union-by-union basis instead of a case-by-case basis. Any determination that a union is out of compliance affects not only the particular case in which the issue is raised but all of the cases on the Board's docket in which the union is a party or affiliate of a party in a Board proceeding. For instance, any determination that the CIO, the union whose compliance was put in issue by respondent, was not in compliance would have affected numerous unfair labor practice and representation cases pending before the Board at the same time as the instant case. Effectuation of Section 9 (f), (g), and (h) of the Act would have required the Board to suspend the proceedings in all of these cases.

Furthermore, the "factual determination of this question [in a separate independent proceeding] will * * * be applicable to all unfair labor practice proceedings in which a particular union is involved with different respondents", thus saving the time and expense in relitigating

the union's compliance status in future cases. *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 651 (C. A. 6). See also, *National Labor Relations Board* v. *Vulcan Furniture Mfg. Corp.*, 214 F. 2d 369, 371 (C. A. 5), certiorari denied, 348 U. S. 873. If need be, the employers in these subsequent cases could utilize the record already developed on the compliance status of the labor organization in the earlier proceeding and seek further consideration of the compliance question in the light of newly offered evidence.

Under all these circumstances it becomes manifest that the separate collateral procedure established by the Board for determining compliance questions appropriately effectuates the Congressional purpose. "[I]n the performance of [its] duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose * * *." *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 253. The Board "should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties" *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143). "No one has a vested right in any given mode of procedure" (*Crane* v. *Hahlo*, 258 U. S. 142, 147), particularly where the party who raises the issue as to the propriety of the Board's established procedure has only a collateral interest in the matter (see *infra*, pp. 44–45).

The legislative history of Sections 9 (f), (g), and (h) establishes that the purpose of these sections was to protect the interest of the employees and the public in the operational and financial responsibility of unions and in freedom from the danger of political strikes. See H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 53; 93 Cong. Rec. 3425, 3629, 3635, A-1911, 5110; Leg. Hist., pp. 344, 616, 789, 800, 869, 1509. See also, *American Communications Association* v. *Douds*, 339 U. S. 382; *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146 (D. D. C.), affirmed, 334 U. S. 854. Nowhere in the legislative history of those sections is there any indication that Congress was in any way concerned in Sections 9 (f), (g), and (h) with conferring any special rights or benefits to employers. The question of the union's compliance does not generally affect the employer's substantive obligations under the Act. As the courts of appeals have uniformly held, Sections 9 (f), (g), and (h) do not in any of themselves minimize or excuse conduct which would otherwise constitute an unfair labor practice.[28] They do not necessarily preclude the Board from proceeding against such conduct upon

[28] See *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 133–134 (C. A. 1), certiorari denied, 346 U. S. 887; *National Labor Relations Board* v. *Pecheur Lozenge Co., Inc.*, 209 F. 2d 393, 402 (C. A. 2), certiorari denied, 347 U. S. 953; *National Labor Relations Board* v. *Tennessee Egg Co.*, 291 F. 2d 370 (C. A. 6), reversing 199

a charge filed by someone other than a noncomplying labor organization.[17] They expressly affect only the availability to the union of the opportunity to initiate proceedings by filing a petition or charge (*supra*, pp. 45-46).

Thus the interest of an employer in the administration of compliance questions under Sections 9 (f), (g), and (h) is but a collateral one. As such, it cannot outweigh the public interest in the orderly administration of the Act which makes it appropriate and desirable that the litigation and determination of such questions be confined to separate administrative proceedings.

E. THE ISSUE IN THIS CASE IS NOT CONTROLLED BY THIS COURT'S DECISION IN THE "HIGHLAND PARK" CASE

The court below, in requiring the Board to permit litigation of the CIO's compliance status,

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F. 2d 95 (C. A. 6); *West Texas Utilities Co., Inc.* v. *National Labor Relations Board*, 164 F. 2d 233, 239 (C. A. D. C.), certiorari denied, 341 U. S. 939.

[17] *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 443-444 (C. A. 3), certiorari denied, 342 U. S. 868; *Southern Furniture Mfg. Co.* v. *National Labor Relations Board*, 194 F. 2d 59, 61 (C. A. 5), certiorari denied, 343 U. S. 964; *National Labor Relations Board* v. *L. Ronney & Sons Fur. Mfg. Co.*, 206 F. 2d 730, 732 (C. A. 9), certiorari denied, 346 U. S. 937; *National Labor Relations Board* v. *Coal Creek Co.*, 204 F. 2d 579, 582 (C. A. 10). If, of course, the Board should find that the person filing a charge or petition is "fronting" for a noncomplying union which stands to benefit from a Board order or certification, the Board will dismiss the charge or petition, as the case may be. See, *e. g.*, *Campbell Soup Co.*, 76 N. L. R. B. 950; *Publishers Printing Co., Inc.*, 110 N. L. R. B. 55; *White* v. *Herzog*, 80 F. Supp. 407, 408 (D. D. C.).

rested its decision (R. 541a) upon the decision of this Court in *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322. The question posed in that case was whether a parent federation such as the CIO was a national or international labor organization within the meaning of Section 9 (h) and hence subject to the filing requirements. This Court, pointing out that upon the "admitted facts" a naked issue of law was involved, held that the question was litigable in the unfair labor proceeding and open to judicial review. The Court, however, carefully drew a distinction between the necessity of compliance by a labor organization (the CIO) and the fact of compliance (on the part of the CIO), saying (341 U. S. at p. 325):

> If there were dispute as to whether the C. I. O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact.

It is this reserved question which is here presented, namely, whether the Board can determine administratively if "the C. I. O. had filed the required affidavits". Unlike in *Highland Park* the question here is not whether the CIO is required to file the non-Communist affidavits in order to avail itself of the Board's processes but

rather whether the CIO has in fact satisfied the filing requirements of Section 9 (h).

Respondent asserts that the compliance status of the CIO is defective because one of its regional directors, Taylor, although not designated by the union as one of its officers, nevertheless, in fact, exercised functions which required his designation as an "officer" within the meaning of Section 9 (h) and therefore should have filed the required affidavit. The determination of this question under the test urged by respondent and approved by the court below turns upon the duties and functions which Taylor performed and the "influence" he may have exerted in the union's affairs. Under the "constitutional test" adopted by the Board (*supra*, pp. 7, 14), the determination of Taylor's status as an officer turns on whether the union has designated Taylor's position as an office in its constitution and, if not, whether the union has acted in bad faith in omitting that position from its constitution in order to circumvent the filing requirements. In either case the dispute here is, essentially, "whether the C. I. O. had filed the required affidavits" (*Highland Park, supra*).

Accordingly, the question posed in this case is entirely different from that raised and decided in *Highland Park*, for here the employer seeks to question only the *fact* of compliance, as distinguished from the *necessity* of compliance, which was the issue in *Highland Park*. As the court

below itself pointed out in *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 650, which dealt with the question of the litigability of compliance questions in a related context, the *Highland Park* case has "not answered" the "question of where or how the issue of compliance [is to be] raised".[18]

II

THE BOARD'S CONSTRUCTION OF THE TERM "OFFICER" IN SECTION 9 (H) TO MEAN A PERSON OCCUPYING A POSITION IDENTIFIED AS AN OFFICE IN A UNION'S CONSTITUTION OR BYLAWS IS REASONABLE AND PROPER

Neither Section 9 (h) nor any other provision of the Act defines the term "officer". In August 1947 the Board issued an interpretation, construing the term "officer", for purposes of the filing requirements of that section, to "include all persons described as 'officers' in the International, National, and/or local constitutions and by-laws" of the union.[19] Subsequently the Board adopted

[18] See *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7). But cf. *Goodman Manufacturing Co.* v. *National Labor Relations Board*, *supra*, p. 36, fn. 10.

[19] The interpretation was adopted contemporaneously with the effective date of the 1947 amendments in instructions from the General Counsel to all personnel responsible for handling compliance. The interpretation was publicized in *A Guide for Labor Organizations* distributed to labor organizations (*supra*, p. 17, fn. 5) and in Daily Labor Report, August 19, 1947, No. 162, p. A–1.

the practice of requiring non-Communist affidavits from persons other than those designated as officers in the union's constitution, "where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements".[20]

The court below rejected the Board's "constitutional test" for determining the meaning of the term "officer" in Section 9 (h) and adopted instead what might be characterized as a "functional test". Under this test, the question whether a person is an "officer" of a labor organization turns on his duties, functions, and responsibilities irrespective of his office or position in the labor organization.[21] Respondent apparently urges an even broader test so as to include "all union executives" and agents whose "posi-

[20] This practice, along with the original interpretation of the meaning of the term "officer", was embodied in Rule 102.13 (b) of the Board's Rules and Regulations, Series 6, promulgated November 29, 1949 (App., *infra*, pp. 71–72). See also Board's *Fifteenth Annual Report* (1950), p. 20.

[21] The court below did not attempt to define the scope of its "functional test" (R. 541a). After reciting respondent's offer at the hearing before the Board to show that Taylor, the CIO regional director for Kentucky, exercised "administrative and executive powers" over the local and a "working control over" other unions in Kentucky, the court remanded the case to permit respondent to introduce testimony "as to the functions and extent of jurisdiction" of Taylor (*ibid.*).

tion of leadership and influence give[s] them an important role in labor relations".[22]

We submit that the Board's definition of the term "officer" is reasonable, accords with the usual and ordinary meaning of the term, and is fully consistent with the objectives of the Act. In any event, neither the commonly accepted meaning of the term "officer" nor the legislative history of Section 9 (h) compels the broad construction given to the term by the court below or urged by respondent.

A. THE BOARD'S DEFINITION OF THE TERM "OFFICER" REFLECTS THE USUAL AND ORDINARY MEANING OF THE TERM

Since Section 9 (h) does not define the term "officer", Congress must be presumed to have used the word in its usual and ordinary sense. *United States* v. *Stewart*, 311 U. S. 60, 63. "[L]egislation, when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a

[22] See respondent's brief in opposition to the Board's petition for certiorari, pp. 16–17.

The Seventh Circuit in its recent decision in *Goodman Manufacturing Co.* v. *National Labor Relations Board*, decided November 10, 1955, has also held that the determinative factor is not whether the position in question is listed as an "office" in the union's constitution. In its view, the term "officer" includes "those who hold positions of responsibility and trust which, in the labor organization's own view, are of sufficient importance to be established by its constitution".

right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618; *Helvering* v. *Hutchings*, 312 U. S. 393, 396.

The basic structure of labor organizations, as well as that of other organizations is, of course, established by the constitution, charter or bylaws of the organization. These instruments create the offices of the organization and determine the duties attached to each office, the role of the officers in the organizational set-up, and their relationship and connections with the different units in the organization, including the executive board. For example, the constitution of the CIO establishes the following officers: president, executive vice president, secretary-treasurer, and eight vice presidents (*supra*, p. 8, fn. 2). Among other things, the president "exercises supervision of the affairs" of the union and has authority, subject to executive board approval, "to appoint, direct, suspend or remove, such organizers, representatives, agents and employees as he may deem necessary". (Article V of the CIO Constitution.) The vice presidents act as assistants to the president and "carry out such special assignments" as are required by the president (*ibid.*). One of these special assignments, entrusted to the executive vice president, is the direction of the Organizational Department, which in turn supervises the regional directors such as W. B. Taylor, the individual in this case claimed to be an officer (*supra*, p. 8, fn. 2).

The positions designated as offices in the constitutions of labor organizations of course vary from union to union, as do the number of offices established and the duties assigned to each office. "The duties and responsibilities of offices are defined, not by logic, but by constitutional provisions and laws."[23] However, the individuals elected officers are normally regarded as "the men with the greatest personal influence in the union. * * * These are the men who administer the policies of the union. The knowledge and power which the officers get as administrators of policies enhances their influence as policy-makers."[24]

Literature in the field of labor relations, as well as the organic instruments of the labor organizations, emphasize the distinction between "officers" and other union executives or agents. For instance, one authority in discussing the different functions of the executive board and of the officers of the CIO states:

> The C. I. O. executive board is large. However, as pointed out * * * there is a separate set of officers as well. These of-

[23] Miller & Form, *Industrial Sociology* (Harper & Brothers, 1951), p. 238.

[24] Slichter, *The Challenge of Industrial Relations: Trade Unions, Management and the Public Interest* (Cornell University Press, 1947), pp. 104–105. See also, Peterson, *Survey of Labor Economics* (Harper & Brothers, 1951), p. 521; Lester, *Labor and Industrial Relations* (Macmillan Co., 1951), pp. 129–130.

> ficers are included in the board, but they constitute a separate and very influential governing body in themselves.[25]

Another source illustrates the distinction between the conventional officers of a labor organization and other executive officials as follows:

> In the usual international union, you find at the top a president and a secretary-treasurer; these are the two top-status, full time positions. In addition, there are a number of vice presidents * * * in charge of the organizing activities. * * * In addition to these positions there is also one executive board which usually consists of the president, secretary-treasurer, and vice presidents, but which in some unions also includes additional persons who are elected.[26]

The distinction between "officers" and other union agents such as organizers, business agents, international representatives, field representatives, stewards, etc., is also illustrated by the usual characterization of these agents as "staff employees" and, not infrequently, as the "noncoms of the union."[27]

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[25] Clyde E. Dankert, *Contemporary Unionism in the United States* (Prentice-Hall, Inc., 1948), p. 115.

[26] Gardner and Moore, *Human Relations in Industry* (Richard D. Irwin Inc., 1950), pp. 142–143.

[27] Sayles and Strauss, *The Local Union: Its Place in the Industrial Plant* (Harper & Brothers, 1953), pp. 10–11; Peterson, *International Unions*, in Bakke and Clark, *Unions*,

The distinction thus recognized between officers on the one hand and executive, administrative, and other agents, prevails in other fields as well. As to corporations, for instance, it is undisputed that an officer "is created by the charter of the corporation". *Vardeman* v. *Penn. Mut. Life Ins. Co.*, 125 Ga. 117, 119, 54 S. E. 66, 67. In that case the court set forth the generally accepted distinction between "officers" and agents in the following oft-repeated language (*ibid.*):

> One distinction between officers and agents of a corporation lies in the manner of their creation. An officer is created by the charter of the corporation, and the officer is elected by the directors or the stockholders. An agency is usually created by the officers, or one or more of them, and the agent is appointed by the same authority. It is clear that the two terms, officers and agents, are by no means interchangeable. One, deriving its existence from the other, and being dependent upon that other for its continuation, is necessarily restricted in its powers and duties, and such powers and duties are not necessarily the same as those pertaining to the authority creating it. The officers, as such, are the corporation. An agent is an employe. "A mere employment, however liberally compensated, does

Management and the Public (Harcourt, Brace & Co., 1948), p. 174; Peterson, *Survey of Labor Economics* (Harper & Brothers, 1951), pp. 522-523; Miller & Form, *Industrial Sociology* (Harper & Brothers, 1951), p. 246.

not rise to the dignity of an office." 21 Am. & Eng. Enc. Law (2d ed.) 836.

Thus the Board's construction of the term "officer" in Section 9 (h) reflects the usual and ordinary meaning of the term as well as the one commonly accepted in the field of labor relations.

B. THE LEGISLATIVE HISTORY OF SECTION 9 (H) DOES NOT REQUIRE THE BROAD CONSTRUCTION GIVEN TO THE TERM "OFFICER" BY THE COURT BELOW OR URGED BY RESPONDENT

Neither in the Committee Reports, nor in the course of debate, did the sponsors of the 1947 amendments deal explicitly with the meaning of the term "officer" in Section 9 (h). The proponents and opponents of the legislation who spoke on the original House bill (*supra*, pp. 21–22) and on subsequent amendments used the term "officer" without elaboration.[28] Occasionally, they used the term "officers" and "leaders" interchangeably.[29] If any significance at all can be attached to Congressional comment, however, the language would tend to indicate that the proponents of the legislation understood the meaning of the term "officer" to apply to high elective union office.

Thus, Senator McClellan, in introducing an amendment to the Senate bill embodying the features of the original House bill (H. R. 3020), which would have denied Board certification to

[28] See 93 Cong. Rec. 3424, 3519, 3528, 6283, A-1035, 4880; Leg. Hist., pp. 643, 677, 694, 874, 993, 1410.

[29] See 93 Cong. Rec. 3627, 6382-6383; Leg. Hist., pp. 786, 884.

unions whose "officers" were members of the Communist Party or held other proscribed membership, affiliation or belief (*supra*, p. 21), stated that the purpose of the amendment was to prohibit certification of unions "headed by a communist" (93 Cong. Rec. 4895; Leg. Hist., p. 1436). Senator Wiley, another proponent of the legislation, in a statement incorporated into the Congressional Record explaining the need for eradicating Communist leadership from the labor movement, stated: "Labor * * * must not cast ballots for union officers who are America-breaking * * * (93 Cong. Rec. A–1035; Leg. Hist., p. 993). And Senator Taft, in a public address, also incorporated in the Record, wherein he opposed the presidential veto of the bill which became the amended Act, asked in a rhetorical vein, "why shouldn't every labor union make Communists ineligible for election as officers" (93 Cong. Rec. A–3044; Leg. Hist., pp. 1627, 1628).

However, even if the legislative history of Section 9 (h) prior to its adoption may not be regarded as especially illuminating, the difference in language used by Congress in Section 9 (f), in enumerating the persons concerning whom information and reports must be filed, is significant. Thus in order to effect compliance with Section 9 (f), Congress provided that the labor organization shall file with the Secretary of Labor, among other things:

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other *officers or agents* whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such *officer or agent* during such year;

(3) the manner in which the *officers and agents* referred to in clause (2) were elected, appointed, or otherwise selected;

* * * * *

(6) a detailed statement of, or reference to provisions of its constitution and by-laws showing the procedure followed with respect to * * * (b) election of *officers and stewards*, * * *. [Emphasis added].

It is evident that when Congress desired operational and financial information concerning "agents" or "stewards" irrespective of their status as "officers," it specifically said so. If it had sought to require non-Communist affidavits from these same union officials it had a simple way to express that purpose. However, Congress used no such broad terms as "agents" or "stewards" in Section 9 (h). The use of different words in two related sections, simultaneously enacted, furnishes "strong reasons for supposing that so striking a change in expression could only have proceeded from a deliberate difference of

'intent". Judge Learned Hand in *Securities and Exchange Commission* v. *Robert Collier & Co.*, 76 F. 2d 939 (C. A. 2). See also *Crawford* v. *Burke*, 195 U. S. 176, 190. Cf. *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 385.

The legislative history of various proposed amendments offered in Congress since the passage of the Taft-Hartley Act lends additional support to the Board's "constitutional test". Thus, when in 1949 the Senate considered a bill (S. 249, 81st Cong., 1st Sess.), which would have made substantial changes in the present statute, an amendment was offered which would have defined the term "officer" in Section 9 (h) to cover "members of all policy forming and governing bodies of the labor organization as well as those designated as such by the constitution of the labor organization".[30] A corresponding provision applicable to employers provided for filing of non-Communist affidavits by "its officers if it is a corporation and each of such employer's agents having responsibility for the employer's labor relations". The amendment was passed by the Senate but never acted upon by the House. So far as we are aware, this proposal and others of similar nature referred to below were prompted not by any disagreement with the

[30] The amendment was offered by Senator Taft in behalf of the minority members of the Senate Committee on Labor and Public Welfare, 95 Cong. Rec. 5589; S. Rep. No. 99, Part 2, 81st Cong., 1st Sess., pp. 45–48, 51–52.

Board's construction of the term "officer" in the present section but by a desire to enlarge the statutory coverage. There is no evidence of any criticism of the Board's construction either in any committee reports or in discussion of the amendments on the floor. Indeed, Senator Douglas, in proposing an amendment dealing with the matter,[31] did not disagree with the Board's construction of the term "officer", but stated that his proposal "is more vigorous than is the provision in the Taft-Hartley law".[32]

Similar proposals were introduced in 1953 by Senator Taft (S. 655, 83d Cong., 1st Sess.) and by Senator Martin in 1954 (S. 2650, 83d Cong., 2d Sess.), neither of which was adopted. These proposals, like the ones already mentioned, are significant in that they establish: (1) That "it would have been a simple matter" for Congress to have expressed an intention to cover adminis-

[31] Under Senator Douglas' proposal the term "officer" would have meant "those persons designated as officers by the constitution and bylaws and members of all executive policy-forming and governing bodies of an employer and any local. * * *" This definition, proposed as an amendment to S. 249, although adopted by the Senate was not acted upon by the House. 95 Cong. Rec. 7720, 7791, 7796.

[32] The Joint Committee (*supra*, pp. 23–24) in its Report to Congress on December 31, 1948, 80 Rep. No. 986, Part 3, 80th Cong., 2d Sess., p. 3, indicated satisfaction with the results of the operation of Section 9 (h), stating: "Elimination of Communist partisans and adherents from official posts and positions of responsibility in both national and local unions is one of the most pronounced and significant effects of the Labor Management Relations Act, 1947."

trative officials and other agents if Congress had so intended (Cf. *National Labor Relations Board* v. *Dant*, 344 U. S. 375, 379); (2) that the reading of the present Section 9 (h) by the proponents of the post. Taft-Hartley amendments accords with that given to the section by the Board; and (3) that the proponents of these amendments recognized that substantial alteration in the language of Section 9 (h) was necessary to give to the section a meaning such as that urged by respondent or adopted by the court below.

C. THE BOARD'S CONSTRUCTION OF THE TERM "OFFICER" IS REASONABLY DESIGNED TO EFFECTUATE THE BASIC PURPOSES OF THE ACT

Section 9 (h) was adopted by Congress to weed out Communists from positions of leadership in labor unions. "By exerting pressures on unions to deny office to Communists and others identified therein, Section 9 (h) undoubtedly lessens the threat to interstate commerce * * *." *American Communications Association* v. *Douds*, 339 U. S. 382, 393. Weighing the evil which it sought to remedy against the practical administration of Section 9 (h), Congress apparently concluded that the eradication of Communist influence from the most prominent positions of labor organizations would extirpate the main possibilities of Communist control.

As we have seen (*supra*, pp. 52–53), the persons designated as officers in the constitutions of

labor organizations are generally regarded as "the men with the greatest personal influence in the union." They usually constitute a substantial portion of the union's executive board, are responsible for the appointment and discharge of subordinates, and control the overall supervision and direction of the every-day operations of the organization. Under the Board's "officer test" all of these officials are required to file non-Communist affidavits. To insure against "even the possibility" of evasion (Board's *Fourteenth Annual Report* (1949), p. 16), the Board will scrutinize the constitution and the practices of unions and will conduct extensive administrative investigations and hearings for the purpose of determining fraudulent omissions from the list of office (*supra*, pp. 17–18).

Congress could have, of course, extended the coverage of Section 9 (h) to all "influential" agents generally, whether or not denoted "officers" in union constitutions, such as international representatives, organizers, regional directors, managers, coordinators, stewards, committeemen, etc. It cannot be gainsaid that these officials perform important administrative and executive functions and may play influential roles in the union hierarchy. Nor can it be denied that Communists may infiltrate and wield considerable

[19] Of course, if any of these officials are in fact designated officers in a particular union's constitution they are required to file non-Communist affidavits.

influence in a union, even though they may occupy positions below the rank of officers. Congress could have barred unions from access to the Board's process whenever any member was a Communist and, irrespective of his position in the union, exercised substantial direction and control over the union's officers.[34] It could also have provided other specific penalties for noncomplying unions, in addition to denial of access to Board processes. It could have for example denied statutory protection to employees who were members of noncomplying unions, or it could have made it unlawful for employers to recognize and bargain with such unions. While such measures might well have constituted even more effective means for the eradication of Communists from labor unions, Congress did not see fit to adopt such methods in the Act. (See cases cited *supra*, p. 44, fn. 16.) "How to curb an evil, what remedies will be effective; the reach of a particular evil and * * * the appropriate scope of a remedy against it—all these are in the main matters of legislative policy not open to judicial condemnation." *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 419 (concurring opinion of Mr. Justice Frankfurter).

Congress in Section 9 (h) appears to have purposefully drawn the line where it did. Congress apparently weighed the mischief it sought

[34] See fn. 36, *infra*, p. 64.

to correct with the feasibility of administering the section. Ascertainment of the identity of "influential" agents necessarily poses serious problems of administration. Appropriate in the consideration of such question is not only the title of the position or the ostensible duties attaching thereto but the extent of the agent's influence in the union, the weight accorded his views and a host of intangible factors. Moreover, the extent of control and influence of a particular individual in a particular union is by no means a constant factor.[35]

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[35] Miller and Form, *Industrial Sociology* (Harper & Brothers, 1951), pp. 246, 250: "For one thing, power, authority, and jurisdiction in democratic organizations are often poorly defined. * * * The fact that the union deals with emergencies means that officials must have power to act quickly. Different officials must have power at different times. The grievance committee or executive board may occupy the focus of attention during some periods. Its members must have almost independent power during bargaining sessions. In another situation, the business agent or international representative must have power. * * * Ideally the role of each important union official should be examined separately. Owing to the diversity of local structures, this is difficult to do."

Ginzberg, *The Labor Leader* (Macmillan Co., 1948), p. 41: "If a leader be one who influences the thoughts and actions of others, the number of labor leader is legion. So broad a definition is not useful. * * * Concentrating on the executive board has its dangers. Some men doubtless succeed in being elected to the executive boards of their unions even though they do not possess the hallmarks of true leadership. Accident or politics catapults them into prominent posts. And the reverse is also true; in almost every union a few powerful leaders do not become members of the executive board."

The difficulties inherent in the administration of a "leadership" or "influential role" test may well have prompted Congress to draw the line at "officers" in the sense that the term is generally understood. The ascertainment of the "influential persons" in a given union without regard to any objective standards would seriously hamper the administration of the Act. Since the Board is precluded from proceeding on petitions and charges filed by noncomplying unions, it would be incumbent on the Board to determine in each case, where the issue was sought to be raised, the role played by all of the officials of the charging union and its affiliates in whatever capacities employed. The process would have to be repeated at various stages of the proceedings to make sure that the union's compliance is up-to-date (*supra*, pp. 18–19). The difficulties in administering the Act would be aggravated if the Board's determination of these matters were subject to litigation in the representation or complaint proceeding. In these circumstances, it cannot reasonably be said that the Board's constitutional test is in any way at odds with the Congressional purpose.[20]

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[20] Cf. the Communist Control Act of 1954, 68 Stat. 775, 777, 778, Sections 7 and 10 amending the Subversive Control Act of 1950, 64 Stat. 987, 50 U. S. C. 781, *et seq.* This Act, which withdraws from "Communist-infiltrated" organizations certain benefits conferred upon labor organizations by the National Labor Relations Act, defines the term "Communist-infiltrated" to include substantial direction or control "by an individual" or group of "individuals", irrespective of the

D. THE BOARD'S CONSTRUCTION OF THE TERM "OFFICER" IN SECTION 9 (h), MADE CONTEMPORANEOUSLY WITH THE ENACTMENT OF THE SECTION BY THE AGENCY RESPONSIBLE FOR ITS IMPLEMENTATION AND ADMINISTRATION, SHOULD BE JUDICIALLY APPROVED UNLESS PLAINLY ERRONEOUS.

Since Section 9 (h) does not specifically define the term "officer", it is reasonable to assume that "[t]hat task has been assigned primarily to the agency created by Congress to administer the Act". *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130. The Board adopted its interpretation of the term contemporaneously with the effective date of the section (*supra*, p. 48) as part of the many rulings and implementations which were essential to efficient functioning and administration of the section. The Board's interpretation is thus entitled to "peculiar weight [for] it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new". *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Moreover, "[t]o sustain the [Board's] application of this statutory term [the Court] need not find that its construction is the only reasonable one, or even that it is the

individual's position in the organization. It is noteworthy that although the sanctions provided concern loss of rights under the National Labor Relations Act, Congress delegated the extensive fact-findings and hearings not to the Board but to a specially created agency.

result [the Court] would have reached had the question arisen in the first instance in judicial proceedings". *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U. S. 143, 153–154. The test on review is "reasonableness and not rightness". Davis, K. C., *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 572. Accord: *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Gray* v. *Powell*, 314 U. S. 402, 412–413; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals.

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NOVEMBER 1955.

APPENDIX

STATUTE AND RULE INVOLVED

A. *Provisions of Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 143, 65 Stat. 601, 602, 29 U. S. C. 159 (f), (g), and (h).*

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded

$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the finan-

cial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a mem-

ber of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

B. *Provisions of Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. (1955 Supp.) 102.13.*

§ 102.13. *Compliance with section 9 (f), (g), and (h) of the act.* (a) For the purpose of the rules and regulations in this part, compliance with section 9 (f) and (g) of the act means (1) that the Secretary of Labor has issued to the labor organization, pursuant to the rules of the Department of Labor, a letter showing that the labor organization has filed the material required under section 9 (f) and (g) of the act; (2) that the labor organization has filed with the general counsel in Washington, D. C., or with the regional director, either as part of the charge (or petition) or otherwise, the duplicate copy of such compliance letter; and (3) that the labor organization has filed with the general counsel or with the regional director for the region in which the proceeding is pending or in which it customarily files cases, either as part of the charge (or petition) or otherwise, a declaration executed by an authorized agent stating that the labor organization has complied with section 9 (f) (B) (2) of the act requiring that it furnish to all of its members copies of the financial report filed with the Department of Labor, and setting forth the method by which such compliance was made.

(b) For the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization, except,

however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.

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